

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

RAYMOND BRADLEY	:	
vs	:	Civil Action No. 02-423
DR. BALTA, CO BERRY, TIMOTHY	:	Judge Terrence F. McVerry/
COLLINS, THOMAS DANDY, KAREN	:	Magistrate Judge Amy Reynolds
DANNER, DAN DEFLORIA, JOAN	:	Hay
DELIE, R.N., JOHN DOE, CO JOHNSON	:	
PHILLIP JOHNSON, GRANT LATIMORE	:	
DIANE MANSON, CO RAY, CO	:	
RUSSELL, WILLIAM STICKMAN ,	:	
EDWARD SWIERCZEWSKI, RICHARD	:	
WHITE AND STEPHANIE WOOD	:	

**DEFENDANTS, EDWARD SWIERCZEWSKI, M.D, AND STEPHANIE WOOD'S
RESPONSE IN OPPOSITION TO ANDREW BALTA, D.M.D.'S
MOTION TO DISMISS BY REASON OF DEATH**

I. Factual Background

Pro Se Plaintiff, Raymond Bradley filed this civil rights action against all of the above-captioned Defendants alleging that he did not receive adequate dental care and pain medication for impacted wisdom teeth that he had extracted while he was incarcerated at SCI-Pittsburgh.¹ Plaintiff specifically alleges that Defendant, Andrew Balta, D.M.D., was deliberately indifferent to Plaintiff's serious dental needs by failing to timely schedule Plaintiff for off-site surgery in order to extract Plaintiff's wisdom teeth. Plaintiff also claimed that Dr. Balta was medically negligent in treating the Plaintiff's dental problems, including the extraction of Plaintiff's wisdom teeth and asserts additional claims of assault and battery and negligent and intentional infliction of emotional distress .

On August 19, 2005, counsel for Dr. Andrew Balta filed a Suggestion of Death due to the death of Dr. Balta. Subsequently, on September 22, 2005, counsel for Dr. Balta filed a Motion to

¹ Plaintiff was incarcerated at SCI-Pittsburgh on April 26, 2000 and was transferred to SCI-Greene on November 13, 2002. Plaintiff is currently incarcerated at SCI-Camp Hill.

Dismiss Dr. Balta by reason of Dr. Balta's death. No other reason or supporting law was given for dismissing Dr. Balta.

II. Legal Argument

Dr. Andrew Balta's Motion to Dismiss by Reason of Death is premature with respect to Defendants, Edward Swierczewski and Stephanie Wood. Defendants, Edward Swierczewski and Stephanie Wood's Motion to Dismiss Plaintiff's Third Amended Complaint and/or for Summary Judgment is still pending, and thus, the time in which Defendants, Edward Swierczewski and Stephanie Wood's responsive pleading, including any cross-claims, has not expired. Pursuant to the Federal Rules of Civil Procedure, should their Motion to Dismiss and/or for Summary Judgment be denied, Defendants, Edward Swierczewski and Stephanie Wood have 10 days in which to Answer to Plaintiff's Third Amended Complaint including stating any cross-claims against co-Defendants, including Dr. Balta. See, F.R.C.P. 12 and 13.

More importantly, Dr. Balta's Motion to Dismiss by Reason of Death is not only premature but flies in the face of establish law which holds that a civil action for damages, survives the death of a defendant. See, e.g., Burns v. Cruthers, 106 F. Supp. 35, 1952 U.S. Dist. LEXIS 3939.

No federal statute specifically deals with the substantive issue of survival of a federal civil rights claim. See, 42 U.S.C. §1988. Nevertheless, Section 1988 has been held to "enlarge the civil right remedy by authorizing resort to state law where state law is not inconsistent." Pritchard v. Smith, 289 F. 2d 153, 157, 1961 U.S. App. LEXIS 4706 (8th Cir. 1961). In Pritchard, the Court of Appeals held that that state law should apply to the plaintiff's federal civil rights claim brought under §1983, particularly in light of the federal courts' "strong trend to construe statutes liberally to allow the survival of tort actions" and the fact that the state law in question provided for the survival of actions for wrongs to the person. Id. at 157-158.

In the instant case, the Court should look to Pennsylvania law which provides that a cause of action “shall survive the death of the plaintiff or of the defendant.” 42 Pa.C.S. §8302. Thus, Plaintiff’s federal civil rights claims, as well as his actions for damages due to Dr. Balta’s alleged medical negligence and any other action for damages, survives the death of the defendant, Dr. Balta.

For the foregoing reasons, Defendants, Edward Swierczewski and Stephanie Wood, respectfully request this Honorable Court to deny Defendant Dr. Andrew Balta’s Motion to Dismiss by Reason of the Death of Dr. Balta.

Respectfully submitted,

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Dated: October 19, 2005

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Judge Terrence F. McVerry/
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Hay

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Defendants, Edward Swierczewski and Stephanie Wood's Response in Opposition to Defendant Andrew Balta, D.M.D.'s Motion to Dismiss by Reason of Death, was filed and served electronically to the following on October 19, 2005:

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